

BEFORE THE HEARING EXAMINER  
CITY OF MONROE, WASHINGTON

RE: SEPA Appeal  
Shoreline Substantial Development Permit  
Shoreline Conditional Use Permit

Applicant: H30 Development, LLC,

Appellant: Diane Elliott

File No(s): AP2012-01  
Shoreline Substantial Development  
Permit SL2012-01  
Shoreline Conditional Use Permit  
SLCU2012-1

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
DECISIONS, AND  
RECOMMENDATION

## I. INTRODUCTION

The Applicant is seeking a Shoreline Substantial Development Permit and Conditional Use Permit for a proposed cable wakeboard park facility and Pro Shop, with related improvements, at Lake Tye in the City of Monroe. Diane Elliott filed an appeal of the SEPA Mitigated Determination of Non-significance issued for the proposal.

As Hearing Examiner for the City of Monroe, I held a public hearing on November 16, 2012 at approximately 9:00 a.m. at the City of Monroe's offices located at 806 W. Main St. in Monroe.<sup>1</sup> The SEPA appeal matter was combined into a single hearing together with the public hearings on Shoreline Substantial Development Permit SL2012-01 and Shoreline Conditional Use Permit SLCU2012-01, as required by WAC § 197-11-680(3) and MMC § 20.04.200(2), as they involve substantially related and similar facts and issues. The Hearing Examiner has jurisdiction to hear the matters pursuant to Monroe Municipal Code § 18.96; § 19.01; § 20.04; and § 21.20. City staff recommended approval of the proposal, subject to conditions.

David Sherrard, Brad Smith, Greg Dick, and Mike Hall appeared and provided witness testimony, together with Exhibits H1 through H15, on behalf of Applicant ("H30"). Diane Elliott appeared and provided witness testimony, together with Exhibits D1 through D35 on behalf of herself as Appellant, and provided additional testimony as an interested citizen. Martha Jordan and Carolyn Vigos appeared and provided witness testimony on behalf of Appellant, and as interested citizens. Zach Lell, attorney at law, appeared at the hearing and represented the City of Monroe ("Respondent" or "City") in this matter, presenting witness testimony, together with Exhibits M1 through M31, and legal argument. Brad Fielberg, Monroe Public Works Director, appeared and provided witness testimony on behalf of Respondent.

Allen Gibbs appeared and provided testimony and written materials (Exhibit P1) as an interested citizen providing input as part of the general public. Several other individuals also appeared as interested citizens providing testimony and input as part of the general public, including: Sue Klinker, Danielle Pino, Carrie Gendron, Lowell Anderson, Meredith Mechling, and Vicky Mullen.

---

<sup>1</sup> I also held an October 25, 2012 prehearing conference with the parties.

The witnesses declared by oath or affirmation the truthfulness of their testimony. I did not receive any written or oral ex parte communication on a fact in issue during the pendency of the proceedings, and made a statement to that effect on the record. I also stated at the hearing that I made an unaccompanied view trip and inspected the site prior to the hearing. The City made a recording of the hearing. The evidence offered was received and all relevant evidence was admitted into the record. At the conclusion of the hearing I noted the fact that several exhibits were submitted by each of the parties during the hearing without an opportunity for review by the other parties. With the consent of each of the parties, I kept the hearing record open through Tuesday, November 20, 2012 for the Appellant to review these exhibits and provide a written statement related to the issues in the appeal, and kept the hearing record open through Tuesday, November 27, 2012 for the Applicant and Respondent to provide responsive written statements. Appellant, Respondent, and Applicant each submitted a written statement. I reviewed and considered the written materials and witness testimony presented as evidence at the hearing, and the written statements submitted by each party, a record of which I incorporate in the decision in this matter. The record is on file with the City.

## **II. FINDINGS OF FACT**

### *Application and Notice: Proposed Use*

1. Applicant H30 submitted a proposal for shoreline substantial development and shoreline conditional use to construct a cable wakeboard facility and Pro Shop at Lake Tye Park in the City of Monroe ("Cable Wakeboard Park"). The proposed Cable Wakeboard Park included a main cable wakeboarding circuit support by six towers with trick features, and a beginner circuit supported by two towers, with the operation located in the southern portion of the lake and occupying approximately 17 acres or 40% of the lake area. The towers are between 22 to 30 feet above the water. Three pre-cast concrete anchors for tower cable lines would be placed in the lake, with guy wires extending to the shore or to the in-water anchors, and additional access points for wakeboarders to exit the water. (Exhibits M2 and M3)
2. The Cable Wakeboard Park proposal also included construction of a 2,500 square foot Pro Shop to house ticketing and rental sales, restrooms, lockers, a sports retail shop, a multipurpose room, and an office. The Cable Wakeboard Park would also include a dock and viewing area of about 10,800 square feet, and would add an additional 25 parking spaces to the existing parking lot at Lake Tye Park. The Applicant also stated that an additional 20 spaces of overflow parking were available for use by the Cable Wakeboard Park by agreement with a business across the street. (Exhibits M2, M4 and M9)
3. The City of Monroe determined the combined application was complete on August 10, 2012. On August 14, 2012, the City mailed, posted, and published notice of the land use application. On September 18, 2012, the City mailed, posted, and published notice of its SEPA determination stating an October 5, 2012 deadline for appeals. The City received several comments, including letters, telephone contacts, and emails in response. The City later mailed, posted, and published notice of land use public hearing, notice of postponement of public hearing, and

subsequent notice of postponement of public hearing. (Exhibits M10, M12 through M19)

*Proposed site; Shoreline Master Plan; Shoreline Management Act*

4. Lake Tye is a 37-acre man-made stormwater pond originally constructed in the Fryelands area of Monroe between 1991 and 1994, on an approximately 62-acre site designated by the City as Lake Tye Park. Opposition to development and grading work on the Fryelands Development Project resulted in the City entering into a settlement agreement whereby the developer and City agreed to create the Lake Tye stormwater detention facility as a flood control mitigation measure. The Army Corps of Engineers provided a letter concerning the project stating that: "the majority of the property under consideration [for construction of the Lake Tye stormwater facility] is 'prior converted cropland,' and as such, is not subject to regulation under Section 404 of the Clean Water Act. Similarly, the Washington State Department of Fish and Wildlife also views Lake Tye as a stormwater management facility, and not a water of the state."<sup>2</sup> (Exhibits M21 and M22)
5. The Lake Tye Park area is zoned as parks/public open space, and surrounds the Lake Tye stormwater pond. The City's Shoreline Master Program states: "The purpose of the "Tye Stormwater Facility" environment is to encourage and enhance recreational uses, public access, and appropriate development while accomplishing the water body's primary function: storing and treating stormwater runoff from nearby lands." The site is within the 100-year flood zone.<sup>3</sup> The park is bordered on the east by Fryelands Blvd. and there is a skateboarding park (Monroe Board and Blade Park) located at the southern access to the area, along with parking facilities, a ball field, tennis courts, basketball court, playground, a rest area and improved picnic area with two picnic shelters, a partially improved boat ramp, and a swimming area with an improved beach. The shoreline of the lake drops off at an approximately 3 to 1 slope to a depth of between 23 and 29 feet, except for the swimming area located along the southwestern shore. There are several grassy areas that are mowed and maintained, giving the Lake Tye Park area the general appearance of an improved urban park. (Exhibits M7-A and M7-B; observation)
6. The area to the north of the park is light industrial. The area to the south of the park is improved with a public school on the west of Fryelands Blvd. and by urban residential development east of Fryelands Blvd. The lake is bordered on the west by a paved running path, and there are power lines on utility poles further to the

---

<sup>2</sup> RCW 90.58.030(2)(h) provides that: "(h) "Wetlands" means areas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands do not include those artificial wetlands intentionally created from nonwetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street, or highway. Wetlands may include those artificial wetlands intentionally created from nonwetland areas to mitigate the conversion of wetlands.

<sup>3</sup> City of Monroe Shoreline Master Program, SMP 2.B.7.

west of the running path, as well as a 10-acre agricultural area. (Exhibits M7-A and M7-B; observation)

7. The City has permitted wakeboarding activities on Lake Tye by special permit, with wakeboarders pulled by a ski boat. The City also allows a number of other special uses of the Lake Tye Park by special permit, including hydroplane races, and triathlon events. The H30 proposal makes 12 days during the “peak season” available to the City to preempt use of the lake for other uses such as these. (Testimony)

*State Environmental Policy Act (SEPA)*

8. On August 7, 2012, the Applicant submitted a Critical Areas Study prepared by Parametrix Inc. concerning the proposed Cable Wakeboard Park. The purpose of the study was: “to describe wetlands and fish and wildlife habitat conservation areas (FWHCAs) in the study area; evaluate potential impacts to these critical areas from the proposed Wake Park; and present mitigation for these impacts in accordance with the City of Monroe Shoreline Master Program and Regulations for Environmentally Critical Areas (Monroe Municipal Code [MMC] Chapter 20.05). The information in this report is intended to facilitate project planning and environmental review during the permit process.” The report was developed based on a review of existing information and June 16, 2012 on-site field investigations conducted by Parametrix biologists. The report noted that the Parametrix biologists reviewed various maps and materials in their analysis of the site, took and analyzed various soil and vegetation samples, rated and classified the wetlands areas, and performed an impact assessment. (Exhibit M4)
9. The Parametrix biologists described the habitat features of Lake Tye, noting that wetlands at the lake “provide habitat for amphibians (likely dominated by the non-native bull frog), waterfowl (primarily foraging, possibly some nesting), and other songbirds (foraging and some nesting).” They also noted that: “The vegetation within the wetland and buffers is dominated by invasive species [such as] reed canarygrass and Himalayan blackberry.” The Parametrix biologists described several other existing habitat features at Lake Tye, and referenced the Shoreline Inventory prepared as part of the Monroe Shoreline Master Program that indicates there are not any endangered, threatened, rare, sensitive, or unique species of plants or wildlife with a primary association to Lake Tye. (Exhibit M4)
10. The Parametrix biologists identified and classified one wetland area (category IV), located at the south end of Lake Tye, noting that the wetland hydrology is supported by Lake Tye and by a storm drain that flows to the lake from a culvert in the southeast corner of the area. The Critical Areas Study predicts no significant changes to the hydrology or adverse impacts to the identified critical area. The report states that: “The U.S. Fish and Wildlife Service (USFWS) lists 14 Species of Concern that have been found in Snohomish County, although none of these species has an actual known occurrence within 1 mile of the City of Monroe or in association with Lake Tye.” The report also notes that the Washington Department of Fish and Wildlife (WDFW) maintains habitats and species maps for the state, and these maps do not identify any priority species associated with Lake

Tye. Similarly, the Washington Natural Heritage Program does not have any records of rare plants, animal species, or high quality ecosystems in the City of Monroe or Lake Tye. (Exhibit M4)

11. The Parametrix Critical Areas Study noted that there are no federal or state management recommendations for Lake Tye, except continuing stocking of rainbow trout by the WDFW. The report recommended: increased, aggressive control of Himalayan blackberry; additional plantings of native trees and shrubs around the pond perimeter; reduced mowing footprints; and, "Using vegetation, fencing or signage to channel pedestrians into specific shoreline areas. Several areas along the west shore are trampled, with bare soils and eroding banks." The report noted that the project would result in permanent impacts to the wetlands and to Lake Tye, describing impacts to the wetlands and to the existing buffers, from the proposed dock, viewing area, pro shop, walkway, maintenance access roadway, and a temporary impact for a new stormwater outlet. (Exhibit M4)
12. The Critical Areas Study noted the very low ecological function of the Lake Tye wetland, concluding: "Due to the low levels of functions and values of Wetland 1 and the frequent disturbances on-site, off-site mitigation (within the Skykomish Basin) would provide equal or better habitat function lift, than what would be provided on-site." (Exhibit M4)
13. The August 7, 2012 Critical Areas Study the Applicant submitted also included an Environmental Checklist for the use of the City in considering the environmental impacts of its proposed Cable Wakeboard Park. The checklist provides a description of the proposal, including listing necessary permits, the size and location of the project with maps and drawings, a description of the site, effects of construction, and proposals to mitigate these effects, noting that the construction would add approximately 0.4 acres of new impervious surface. The checklist states that runoff from the new pollution generating parking area would be directed to the existing stormwater drains, to the bioswale area. (Exhibit M9)
14. The checklist states that the cable system would be driven by a 37-kilowatt electric motor, so the facility would not generate air emissions during its operation. The Cable Wakeboard Park facilities would use existing water, sewer, and electric utilities already on site. (Exhibit M9)
15. The checklist states that the project is expected to generate additional traffic flow of approximately 400 cars per day during the peak summer period. The checklist states that three concrete anchors for cable lines and piles for the launch dock would be placed in the lake, with each anchor approximately 36 square feet, and "at least three" trick features may also be anchored around the circuit." The checklist also notes that maintenance of the motorized emergency-services jet ski located on the dock would occur only on land. (Exhibit M9)
16. The Environmental Checklist describes the specific wetlands and buffer spaces the project would displace, and describes proposed mitigation in the Skykomish Habitat Mitigation Bank, an approved Wetland Bank. The checklist describes the

plants, birds, and animals known or observed on or near the site, including: songbirds, waterfowl, gull, bass, trout, and sunfish, and notes that: "The site is located within the Pacific Flyway migration route. The trumpeter swan has been reported to seasonally use Lake Tye, but it is not currently listed." The checklist also provides this statement:

Analysis conducted at communications towers has found that "avian mortality [at communications towers] would be reduced by restricting the height of towers, avoiding guy wires, using only red or white strobe-type lights as obstruction lighting, and avoiding ridgelines for tower sites (Longcore et al. 2008)"

The towers for the wakeboard facility are between 22 to 30 feet above the water, significantly shorter than communication towers. The cables between the towers would not conduct electricity like the guy wires do for communications towers. The project towers would not be lit and would not be located on a ridgeline. The project towers are not expected to be a hazard to birds. (Exhibit M9)

17. The checklist described the equipment noise for the Cable Wakeboard Park as negligible, with noise mostly limited to people enjoying the facility in a manner similar to existing park uses, with hours of operation between dawn and dusk. The checklist provided descriptions of the project's probable effects on other uses at the park, the aesthetics of the project, and referenced a Transportation Impact Analysis also provided by Parametrix describing the effect of the Cable Wakeboard Park on transportation serving the site. The Applicant also prepared and submitted a Geotechnical report. (Exhibit M9)
18. On August 20, 2012, Allen Gibbs of the Pilchuck Audubon Society wrote to Brad Fielberg, the City's Public Works Director, to comment concerning the Environmental Checklist submitted by H30 as part of the Cable Wakeboard Park proposal, with specific comments focusing on the sections concerning plants and animals. The letter criticizes a lack of detail in describing plants and animals, and lack of avian information in the Environmental Checklist. The report describes regular sightings of a bald eagle at Lake Tye during the fall, winter, and spring, and notes that red-tailed hawk, Merlin, and peregrine falcon have been reported along the Lake Tye shoreline and perched on the nearby power poles, hunting fish and water birds, and sightings of coyote, deer, and other mammals at the west shore area of Lake Tye. The letter notes that the towers and guy wires for the proposed Cable Wakeboard Park would be on the water and therefore more likely to pose a hazard to water birds. Mr. Gibbs criticizes the proposal for failing to include any mitigation measures concerning the hazard to birds flying into the area. (Exhibit D7)
19. On August 20, 2012, Martha Jordan of The Trumpeter Swan Society, and Washington Swan Stewards, wrote to Brad Fielberg concerning the Environmental Checklist submitted by H30 as part of the Cable Wakeboard Park proposal. Ms. Jordan also asserts that the Parametrix reports and checklist are deficient in both the plants and animals sections, noting that the one-day site visit by Parametrix

biologists is “only a tiny snapshot of the environmental dynamics of the lake.” Ms. Jordan points to the reference in the Environmental Checklist to the Pacific Flyway migratory route for waterfowl and other avian species. Ms. Jordan points to information from the Washington Department of Fish and Wildlife describing the Snohomish and Snoqualmie River valleys as areas of significance for trumpeter swans as well as concentration areas for wintering waterfowl. The report describes habits of the swans in the area, use of dairy farms south of Monroe, and major night roosts at nearby Bob Heirman Wildlife Park and Crescent Lake. (Exhibit D9)

20. In her August 20, 2012 letter, Ms. Jordan asserts that the Parametrix reports ignore the issue of avian collisions with the cable lines and guy wires required by the proposed Cable Wakeboard Park. The letter provides additional guidance concerning avian collisions with power lines and guy wires, reporting that incidents have occurred on the power lines to the west of Lake Tye. Ms. Jordan compares the towers, cables, and support guy wires of the proposed Cable Wakeboard Park to the incidents occurring with communication towers and power lines, asserting that the cables and guy wires for the proposed Cable Wakeboard Park should be marked with avian diverters because they pose a particular hazard due to the proximity to the water. (Exhibit D9)
21. On September 13, 2012, David Sherrard of Parametrix provided the City with a revised SEPA Environmental Checklist and revised Critical Areas Report in response to the August 20, 2012 letter provided by Mr. Gibbs. The revised Environmental Checklist includes more detailed descriptions of the plants, animals, fish, and avian populations found at Lake Tye. The revised Environmental Checklist provides detailed information concerning the Pacific Flyway Migratory route and the trumpeter swan population, noting that the population has increased overall, but also noting that Lake Tye itself is not a major concentration area. The revised Environmental Checklist provides information and guidance concerning avian mortality, including collisions with power lines, and collisions with communication towers, noting that the primary cause of death associated with power lines is electrocution, and noting that communication towers are significantly taller than the towers and guy wires for the proposed Cable Wake Park. The revised Environmental Checklist suggests that marking the cables with avian diverters could reduce the potential for bird collisions, but the aesthetic impacts for people observing the site should also be considered. Mr. Sherrard further noted that the Applicant would not object if avian diverters were required for guy wires year round and for the main carrier cables during the winter months when the wakeboard facility is not used. The revised Environmental Checklist also provided more detail concerning the proposed wetlands mitigation. (Exhibit M11)
22. Brad Fielberg is the City’s SEPA Responsible Official. On September 14, 2012, Mr. Fielberg reviewed the proposal pursuant to SEPA<sup>4</sup> and issued a Determination of Nonsignificance with Mitigation, with a required condition of payment of a traffic

---

<sup>4</sup> State Environmental Policy Act (SEPA)

mitigation fee of \$5,677.65.<sup>5</sup> Mr. Fielberg testified that he received and reviewed the applications submitted by H30, issuing a notice of completeness. On September 18, 2012, the City sent notice scheduling a public hearing concerning the proposal, and published notice of the SEPA determination stating an October 5, 2012 deadline for appeals. The City received several comments, including letters, telephone contacts, and emails in response. (Exhibits M10, M12 through M19)

23. Mr. Fielberg testified that he considered the comments submitted, including the letters provided by Mr. Gibbs and Ms. Jordan, considered the application and supporting documents submitted by the Applicant (the revised Environmental Checklist and Critical Areas Report prepared by Parametrix), and considered his own personal knowledge (of Lake Tye, and the area). Mr. Fielberg noted that he is aware of numerous fish, birds, and animals at Lake Tye, but has never personally seen a trumpeter swan at the lake. Mr. Fielberg testified that he also reviewed the City's Shoreline Master Program, the State's Shoreline Management Act, and the staff report, considering all of this information in its entirety. Mr. Fielberg testified that after considering this information, he determined that the proposed Cable Wakeboard Park did not have a probable significant adverse impact on the environment, and therefore an environmental impact statement (EIS) was not required. Mr. Fielberg testified that he has a BS degree in civil engineering, with a public works certificate, a BS degree in geology, and a master's degree in emergency management.
24. On October 5, 2012, Appellant Dianne Elliott submitted an appeal to the City of the September 14, 2012 SEPA determination. Ms. Elliott provided copies of excerpts from the SEPA regulations and definitions, the City's Shoreline Master Program, references to the Washington Department of Fish and Wildlife, and US Fish and Wildlife Service. The excerpts included information concerning the Trumpeter Swan and the Pacific Flyway. Ms. Elliott provided several rationales as the basis for her appeal, falling into three main categories, and made several assertions concerning the appropriateness of the City's handling of the matter. Ms. Elliott also made several assertions concerning City staff, administration, and the proposal here that are outside the scope of the SEPA appeal process. (Exhibits D0, D1 and D2)
25. Firstly, Ms. Elliott asserts impact to wildlife. Ms. Elliott notes that Lake Tye is adjacent to agricultural acreage that attracts various migratory and resident waterfowl and wildlife, and provides a nearby body of water for these various species. Ms. Elliott asserts that the City's SEPA determination fails to adequately consider the impact of increased noise from operation of the Cable Wakeboard Park on the wildlife using Lake Tye. This includes the "synergistic effects" of the many changes to Lake Tye resulting from the proposal, such as exclusion of wildlife from the operating area of the Cable Wakeboard Park, wildlife leaving due to the noise and use, increased mortality from avian collisions with towers and

---

<sup>5</sup> This fee was per the Washington State Department of Transportation Interlocal Guidelines for Coordination with the City of Monroe for mitigation of development impacts.

cable wiring and supports, possible collisions with wakeboarders, and other stress on the ecosystem, resulting in effectively removing this water source and surrounding ecotones for multiple species. Ms. Elliott asserts that towers over land are not that same as towers over water, and cable wakeboard towers will be especially attractive to large raptors including bald eagles and trumpeter swans. (Exhibits D3 and D4)

26. Secondly, Ms. Elliott's appeal contends that the City's SEPA determination ignores the impact of the Cable Wakeboard Park on liveability in the Lake Tye Park neighborhood and the impact of increased noise from operation of the Cable Wakeboard Park on the neighborhoods adjacent to the park. Specifically, Ms. Elliott contends that the City's SEPA determination does not address potential negative effects of the machinery's noise on local residents, and noise and congestion from increased traffic, parking in local neighborhoods, and the increased number of people using the park. Ms. Elliott asserts that increased use generated by the Cable Wakeboard Park would result in the need for increased public services, including police enforcement, traffic control, and garbage removal, have a generally negative impact on property values in the area, and does not address community opposition to the proposal. (Exhibit D3)
27. Thirdly, Ms. Elliott asserts that the City's SEPA determination ignores the wake action from the wakeboarders. Ms. Elliott contends that the wake from the wakeboarders will impact other uses of the lake such as fishing, canoeing, and use of the area for model boats and planes. Further, Ms. Elliott contends that the City's SEPA determination does not adequately address the effect of the wake action on the shoreline and lake area vegetation. Ms. Elliott notes that the wakeboards used by participants are 4-5 feet in length and asserts they should be considered equivalent to motorized boats. Ms. Elliott contends that the possible erosion impact of the wakeboarding activity on the lake was not determined, and the danger of mixing wakeboarding with other activities at the lake presents a danger that was not addressed. (Exhibit D5)
28. Ms. Elliott testified at the hearing, asserting the City's park rules for Lake Tye prohibit use of motorized boats in excess of 1  $\frac{3}{4}$  hp, largely restricting use of Lake Tye to more passive activities such as fishing, canoeing, and swimming (except by special permit) and this issue should be addressed.<sup>6</sup> Ms. Elliott testified that local residents and park users already hear noise from the skateboarding and current uses of the park, and the noise impact to the community and to the park of adding the proposed Cable Wakeboard Park has not been adequately considered. Ms. Elliott further contends that the additional burden to transportation of adding the projected 370 – 400 additional daily vehicular trips to the park was not adequately considered. Ms. Elliott additionally asserts that the City's SEPA determination fails to adequately consider the impact of wave activity from wakeboarders on other users of the lake such as people swimming, canoeing, kayaking, and fishing, noting that the proposal provides for no barrier between the wakeboarders and these other users.

---

<sup>6</sup> See MMC 9.28.110 Use of watercraft.

29. Carolyn Vigos has a Masters of Sciences degree and 20 years experience working with regulatory agencies. Ms. Vigos asserts that the SEPA determination ignores the presence of raptors and other large birds at Lake Tye, with no studies considered that document or analyze the additional impact from the Cable Wakeboard Park's towers, cables and guy wires, to birds drawn to the lake due to the presence of fish and waterfowl. Ms. Vigos asserts deficiencies in the Parametrix reports concerning small mammals such as otters, muskrats, and weasels at the lake.
30. Martha Jordan is a wildlife biologist with substantial experience with trumpeter swans and other birds that use the migratory corridor. Ms. Jordan testified that Lake Tye falls within the confluence of the migratory corridor, and has documented cases of avian collisions with the power lines to the west of Lake Tye. Ms. Jordan testified concerning bird collisions on the power lines west of Lake Tye, including the taking of a bald eagle, and testified regarding her concerns that the towers, cables, and guy lines for the Cable Wakeboard Park are highly likely hazards to birds, strongly suggesting appropriate markers for the lines or use of towers without guy wire supports. Ms. Jordan testified that she is working to get the power lines west of Lake Tye marked.
31. Ms. Jordan agreed with Mr. Sherrard's assertions that the population of trumpeter swans in the area has grown to approximately 25,500 to 27,000, and this population meets the management goal for the pacific flyway. Ms. Jordan testified that there were 12 reported trumpeter swan collisions with wires in Snohomish County last year, including one reported trumpeter swan that died on the power lines west of Lake Tye. She also agrees with Mr. Sherrard that the standard is "probable significant adverse impact," that this standard is different than the issue of illegal "take" of birds, and that these unfortunate incidents are not sufficient to significantly adversely impact the trumpeter swan population. Ms. Jordan described trumpeter swans as large, low-flying birds that are not very agile when landing or taking off, making wires a particular hazard for them. Ms. Jordan also testified that there is a mitigation requirement that must be met with respect to these known hazards, and the nearby agricultural areas attract waterfowl to Lake Tye. Ms. Jordan testified concerning trumpeter swan populations and movement in the general vicinity, and their use of nearby wetlands areas as habitat.
32. Mike Hall has 20 years experience with the Forest Service, and has completed 10-12 Environmental Impact Statements, including on evaluations to determine whether a proposal involved significant adverse impact to waterfowl. Mr. Hall testified that whether a given proposal is likely to result in a significant adverse impact to waterfowl is often a matter of judgment, is situation-specific, and involves evaluating a number of factors such as whether a given avian population is listed, whether there is a substantial change to the population, etc. Mr. Hall testified concerning the power lines located to the west of Lake Tye, estimating avian fatality from collisions at approximately 55. Mr. Hall testified that this is not a significant number of avian fatalities, and the numbers of birds taken by hunters in the area dwarfs this number. Mr. Hall testified concerning trumpeter swans,

testifying that the population has continuously increased since 1968 despite avian collisions and deaths from lead poisoning. Mr. Hall also testified concerning the impact of the proposal to other wildlife at Lake Tye (such as otters, weasels, and muskrats) describing the habitat as low quality and not an essential location, due to the high level of human activity in the park, the concentration of residential, park, and industrial uses, and the lack of natural conditions (including ornamental trees and mowed grass). Mr. Hall stated that there are other areas in the vicinity that provide much better habitat.

33. Mr. Hall agrees with Appellant that cables such as those in the Cable Wakeboard Park proposal can create avian hazards, and he is aware that trumpeter swans have the special designation status of greatest conservation need. Applicant provided email correspondence from Mr. Rob Larson (with Snohomish PUD/Avian Protection) concerning trumpeter swan and other avian collisions with the PUD power line west of Lake Tye. The correspondence states that Snohomish PUD operates about 3,700 miles of overhead power line, and there have been 55 reported collision incidents since the year 2000, of which approximately 30 have been swans. Mr. Larson notes that these are recorded incidents, and that the reported numbers likely underestimate the total. Applicant also provided email correspondence between Mike Hall and Mr. Melvin Walters, who manages an avian protection program for PSE, and a brochure concerning the program. The correspondence and brochure indicate that about 212 incidents involving swans occurred between 2000 and 2008 and that the annual occurrence rate was increasing from 2000 through 2008-09, but has been decreasing since installation of avian diverters in certain key areas where lines are in high-use areas. The correspondence also notes that these collisions as a whole do not actually have an impact on the swan population. (Exhibits H8-H10)
34. Mr. Sherrard asserts that Lake Tye is not a centrally important resource or essential habitat, is not used as a nesting area, and its use by water fowl and other birds is minor compared to use of other, better habitat in the area. Mr. Sherrard points out that the shoreline for Lake Tye is artificial and drops off very steeply, without providing for the shallows and wetlands areas that attract waterfowl and wildlife. Mr. Sherrard testified that there are hundreds of thousands of migratory birds and waterfowl that use the migratory corridor, and only a very small number are seen at Lake Tye. Mr. Sherrard also contends that potential impacts to waterfowl at Lake Tye are already reduced by the summer-months nature of the proposed Cable Wakeboard Park, with the waterfowl using the area for winter migration. Mr. Sherrard further points out that the Migratory Bird Treaty is administered by the Fish and Wildlife Service, which has authority over issues affecting migratory birds and could, for example, require the use of avian diverters at the Cable Wakeboard Park.
35. Mr. Sherrard contends that wakeboards are not “motorized” as asserted by Appellant, and provisions for motorized watercraft do not apply. He further points out that there is a 75-foot wide area between the western shoreline of Lake Tye, and the area proposed for use by wakeboarders, leaving ample space to separate the wakeboarders from other uses such as boating and swimming. Mr. Sherrard

asserts that the wakeboarders using the Cable Wakeboard Park will produce small wakes that will dissipate over a relatively short distance, similar to swimmers and divers, and will have less impact than the wind. Mr. Sherrard points out that the lake is very deep, with the shoreline dropping steeply, and contends that the small wake produced by wakeboarding will have no effect on sediments at the bottom of the lake.

36. On October 23, 2012, Paul Anderson with the Washington Department of Ecology wrote to the City regarding the September 14, 2012 SEPA determination (MDNS). Mr. Anderson indicated in his correspondence that he had reviewed project documents, noting: "One specific area of the project SEPA checklist and subsequent submittals that requires a more detailed analysis is increased wave energy from the wakeboard circuit operation and risk of water quality degradation." Mr. Anderson expressed concerns regarding the potential for ecological degradation due to increased turbidity or mobilization of contaminated sediments, noting that inadequately treated and detained stormwater has been discharging to Lake Tye, and urban stormwater is known to carry a number of contaminants. Mr. Anderson stated: "If wave energy and potential adverse impacts have not been assessed, they need to be.... The application should be updated with analysis of changes in wave energy from wake park operation, the presence and extend to contaminated sediments in Lake Tye and potential ecological and water quality impacts of increased wave energy." (Exhibit D23)
37. Applicant H30 provided a November 15, 2012 study of the potential for cable pulled wakeboard or skier generated waves to cause shoreline or lake bottom erosion. The study was conducted by Bruce Stoker of Earth Systems, and involved review of site plans, pond topography and bathymetry, geotechnical report, review of site geology in the field and from published geologic maps of the area and region, and a site visit to assess shoreline and near-shore soils, vegetation, and present conditions. Mr. Stoker reported that the site was visited several times during excavation of the lake. Mr. Stoker described in his report the composition of conditions of the shoreline in various locations, the lake bottom in various locations, and the composition of the sediment. (Exhibit H7)
38. Mr. Stoker stated in the November 15, 2012 report that "wind wave, boat wave, and cable pull wakeboard wave studies along with over 3 decades and hundreds of site specific studies of shoreline erosion that Bruce Stoker of Earth Systems has conducted are used to support conclusions of this assessment." In the report, Mr. Stoker noted that: "The wakeboards (or water skies, knee boards, and tubes) produce relatively small wakes especially when compared to boat waves and wind waves on Lake Tye." Mr. Stoker provided detailed measurements and analysis of the waves and comparisons to wind waves and boat waves, stating several conclusions and the following relevant comments:

"Wind generated and wakeboard or ski generated waves will not touch bottom and suspend lake bottom sediment because of water depths between 20 to 30 feet. Nearshore area sediments are regularly moved by wind waves, and fluctuation of the water level, creating a gravel lag. The regular reworking of these sediments would prevent retention of fine grain contaminants (if present) in

materials in the nearshore....It is my experience and conclusion that some waves of 4 to 12 inches height could be generated with sharp turns and when a person falls; these waves have a single momentum input...so they will dissipate to a few inches height before striking the near-shore area. The largest waves produced by wakeboarding will be of similar scale as those produced by active swimming and people jumping off docks and playing in the water. Cable towed wakeboard waves would be smaller than waves produced during wind storms across Lake Tye and similar in size to wind waves produced during gentle storms.” (Exhibit H7)

39. Mr. Sherrard agrees with Appellant that the Cable Wakeboard Park will produce additional noise at the park, and it is important to consider the cumulative impact of the noise, but contends the activity fits in with the urban park setting of Lake Tye, and the surrounding human uses of the park. Mr. Sherrard asserts that the impact of the noise from the Cable Wakeboard Park will not be different than the existing noise level, pointing to nearby noisy arterial roads and freight trains. Concerning additional traffic generated by the Cable Wakeboard Park, Mr. Sherrard points to the Transportation Impact Analysis provided to the City and among the information considered.

*Public Comment*

40. The City also received further correspondence offering comment on the proposed use. The City received email correspondence from Linda Huskey opposed to the location of the proposed Cable Wakeboard Park in the south end of Lake Tye, expressing concern regarding the impact to other activities such as swimming. The City received email correspondence from Dana Brash, also opposed to the project, expressing concern that the proposed Cable Wakeboard Park would be disruptive and not in the community interest. The City received correspondence from Theresa Yap expressing opposition to the proposed Cable Wakeboard Park and its potential effect on the area.
41. Ms. Jordan provided a second, October 1, 2012 letter, addressing the supplemental, revised Critical Areas Study and Environmental Checklist provided by Parametrix. Ms. Jordan pointed to US Fish and Wildlife Service management plans for different populations of trumpeter swans, noting that these documents were not used by Parametrix, and she contends that the reports provided by Parametrix omit information on the status, habitat needs and management concerns for trumpeter swans in western Washington. Ms. Jordan notes that trumpeter swans are a designated species of greatest conservation need, requiring greater consideration. Ms. Jordan asserts that no cable wakeboarding circuits have previously been built within a major migratory flyway corridor or major winter use area. Ms. Jordan asserts that the avian collision issue is of serious concern, due to supporting guy wires and cables built over the lake itself in an area of known waterfowl concentrations. Ms. Jordan strongly suggests requiring adequate line marking (avian deflectors, etc.), including marking the guy wires year round and the cable lines during the seasonal closure of the facility, to provide collision protection for the waterfowl and other water birds that come to the lake, to mitigate the impact of the proposal. (Exhibit M-18B)

42. Allen Gibbs, representing the Pilchuck Audubon Society, also provided further correspondence offering comment on the proposed use, and also criticized the revised reports provided by Parametrix. Mr. Gibbs stated in his follow-up October 1, 2012 correspondence that eagles, hawks, owls, Canada geese, white fronted geese, Western Grebe (species of greatest conservation need), and other species are using Lake Tye as a gathering place. Mr. Gibbs strongly suggests marking the guy wires with avian deflectors year-round, and marking the cables during the off-season. Mr. Gibbs also testified at the hearing in support of requiring avian collision prevention devices on the tower guy wires, and on the cable lines during the off-season, to mitigate the impact of these hazards to birds. Mr. Gibbs asserts that these avian markers should be in place within a few days of the close of the season, or by November each year, to reduce the impact to migratory waterfowl. Mr. Gibbs also points out that the proposal will significantly reduce the lake area available to fish-eating birds, and contends that some mitigation should be required to ease this loss. (Exhibit M18-E)
43. Diane Elliott also presented additional public comment questioning whether the concessionaire agreement is in the City's best interest, and questions the use of the current picnic area and removal of existing facilities.
44. Carolyn Vigos also presented additional public comment, questioning whether the City had addressed the issue of milfoil, an invasive aquatic plant known to transfer from lake to lake via boat. Ms. Vigos expressed concern that milfoil could become established at Lake Tye, and migrate through drainage to French Creek. Ms. Vigos also expressed concerns regarding possible contaminants in the sediment from the nearby railroad bed, and other pollution, including possible illegal dumping into Lake Tye.
45. Sue Klinker is a 26-year resident of Monroe who opposes the Cable Wakeboard Park. Ms. Klinker points to the many events that took place in Monroe parks and recreation areas during the 2012 calendar year, and contends that the proposed Cable Wakeboard Park does not fit in. Ms. Klinker points out that wakeboard implies "wake" and will not fit in with existing, more peaceful and quiet activities.
46. Danielle Pino is a student at Monroe High School who is in favor of the Cable Wakeboard Park. Ms. Pino reported that H30 gave a presentation at Monroe High School concerning the proposed Cable Wakeboard Park, and the student population took a unanimous vote in favor. Ms. Pino described the cable wakeboard presentation as "not that loud." Ms. Pino asserts that the proposed Cable Wakeboard Park will provide a benefit to the student population, including enjoyment of fun, physical activity.
47. Carrie Gendron is a Monroe citizen who is also in favor of the Cable Wakeboard Park. Ms. Gendron testified that there is substantial community support from local churches, families, youth, and businesses, excited to have the Cable Wakeboard Park at Lake Tye. Ms. Gendron asserts that Lake Tye Park should be used to its full capacity, and the proposed use fits in with the City's "gateway to adventure" and outdoor recreation goals of the city. Ms. Gendron contends that the Cable

Wakeboard Park is a way for children to have fun and be noisy in a safe, healthy way, noting that students may even have an opportunity to earn PE credits. Ms. Gendron testified that she is a wakeboard user, and runs 2-3 times each week along Lake Tye. Ms. Gendron testified that she has never seen a trumpeter swan at lake Tye.

48. Lowell Anderson is a Monroe citizen who is opposed to the Cable Wakeboard Park. Mr. Anderson is familiar with questions raised by Paul Anderson with the Washington Department of Ecology concerning untreated sediment at the bottom of Lake Tye, and inadequately treated stormwater in Lake Tye. Mr. Anderson states he will not allow his own children or grandchildren to swim in Lake Tye because he is not assured that it is safe, and is concerned that the City will incur liability. Mr. Anderson is also opposed to the use of this public space for a private, commercial venture.
49. Meredith Mechling is a concerned citizen opposed to the Cable Wakeboard Park. She is concerned that the sediment in Lake Tye is not safe, contending that runoff from the nearby industrial park, racetrack, and fairgrounds, and runoff from impervious surfaces, are present and there is inadequate testing. Ms. Mechling contends that the additional use of Lake Tye by wakeboarders use of the water and climbing out at shoreline banks will result in stirring of this sediment and contamination.
50. Vicky Mullen is a concerned citizen opposed to the Cable Wakeboard Park. She is concerned with respect to the quality and safety of the sediment and water in Lake Tye, stating that she would never set foot in the lake or allow her children to do so. Ms. Mullen is concerned regarding the safety of the children that use the existing sandy beach area at Lake Tye.
51. The City received an October 23, 2012 letter from Paul Anderson, a Wetland Specialist with the Washington Department of Ecology, commenting on the proposed Cable Wakeboard Park. Mr. Anderson raised concerns regarding the need to assess increased wave energy from the wakeboard circuit and the risk of water quality degradation. Mr. Anderson also raised questions regarding the potential for sediment contaminants in the Lake Tye area from inadequately treated and detained stormwater from the Frylands area discharging to Lake Tye. He expressed specific concern regarding the need to assess ecological degradation due to increased erosion along the shoreline and water quality degradation due to increased turbidity or mobilization of contaminated sediments. (Exhibit D23)

#### *Staff Recommendation*

52. Staff recommended approval of shoreline substantial development permit (SL2012-01) with the following conditions:
  - All development shall proceed in accordance with the mitigation conditions listed in the Mitigated Determination of Non-significance (SEPA2012-01) issued August 7, 2012.

- All development is required to be in accordance with the approved site plans per Monroe Municipal Code 18.82.
  - Authorization to conduct construction activities is valid for five years. The hearing examiner may authorize one (1) twelve month extension.
  - The Applicant cannot commence construction until 21 days have elapsed from the date of transmittal of the Department of Ecology's final decision on Shoreline Conditional Use Permit SLCU2012-01.
  - The applicant will be required to comply with all applicable, local, State, and Federal laws, regulations, and rules.
53. Staff recommended that the Hearing Examiner submit a recommendation of approval to the City Council of Conditional Use Permit (SLCU2012-01)
- All development shall proceed in accordance with the mitigation conditions listed in the Mitigated Determination of Non-significance (SEPA2012-01) issued August 7, 2012.
  - All development is required to be in accordance with the approved site plans per Monroe Municipal Code 18.82.
  - Authorization to conduct construction activities is valid for five years. The hearing examiner may authorize one (1) twelve month extension.
  - The Applicant cannot commence construction until 21 days have elapsed from the date of transmittal of the Department of Ecology's final decision on Shoreline Conditional Use Permit SLCU2012-01.
  - The applicant will be required to comply with all applicable, local, State, and Federal laws, regulations, and rules.
54. Staff requested the Hearing Examiner to deny Ms. Elliot's appeal and uphold the City's SEPA determination.

### **III. CONCLUSIONS**

The evidence presented is reliable, probative and substantial evidence upon which to base a determination in these matters.

#### **A. SEPA Appeal**

State law emphasizes that the procedural determinations of an agency's SEPA Responsible Official are entitled to "substantial weight" in any appellate proceeding,<sup>7</sup> and the City of Monroe's Code adopts this same standard of review.<sup>8</sup> Under this standard, the party appealing the SEPA Responsible Official's determination bears the burden of proving that the decision is "clearly erroneous."<sup>9</sup> Under this standard of review, the Hearing Examiner must be left with the definite and firm conviction that a

---

<sup>7</sup> RCW 43.21C.090; *OPAL v. Adams County*, 128 Wn.2d 869, 913 P.2d 793 (1996); *Brinnon Group v. Jefferson County*, 159 Wn.App. 446, 245 P.3d 789 (2011).

<sup>8</sup> MMC 20.04.200(C).

<sup>9</sup> *Brown v. Tacoma*, 30 Wn.App. 762, 637 P.2d 1005 (1981).

mistake has been committed.<sup>10</sup> The City of Monroe has adopted procedures providing for the administrative appeal of determinations relating to SEPA.<sup>11</sup> These procedures are codified at Chapter 20.04 of the Monroe Municipal Code. The relevant portions provide:

If the appeal has been timely filed and complies with the requirements of subsection (A)(1) of this section, the hearing examiner shall conduct a public hearing into the merits of the appeal. The hearing examiner shall hear and receive testimony, documentary evidence, and arguments from the appellant(s) solely on the issues raised or identified by the appeal. Appeals of threshold determination shall be consolidated in all cases with any public hearing on the merits of the proposal held by the hearing examiner, except for appeals of a DS, which shall be heard separately from the underlying project proposal.

- a. The person(s) filing the appeal shall have the burden of going forward with the evidence and the ultimate burden of persuasion.<sup>12</sup>

Thus, as Appellant, Ms. Elliott bears the burden of proof in this matter concerning the issues she has raised in her appeal, and the Hearing Examiner may only consider evidence and argument on the issues raised in the appeal.

A mitigated determination of non-significance is a procedural determination made by the SEPA Responsible Official that a proposal, with conditions and mitigation requirements, has no probable significant adverse environment impacts for which an environmental impact statement (EIS) should be prepared.<sup>13</sup> SEPA does not require any particular substantive result with respect to the underlying proposal; rather, the statute ensures that environmental factors are afforded due consideration in the decision-making process.<sup>14</sup> Whether a particular impact is “significant” under SEPA involves context and intensity, varies with the physical setting, and depends on the magnitude and duration of an impact.<sup>15</sup> “Significant” as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality.<sup>16</sup> In reviewing a decision under the clearly erroneous standard, the [hearing examiner] is required to “examine the entire record and all the evidence in light of the

---

<sup>10</sup> *Couger Mt. Assoc. v. King County*, 111 Wn.2d 742, 747, 765 P.2d 264 (1988).

<sup>11</sup> WAC 197-11-680 provides administrative guidance for implementing the SEPA appeal provisions in RCW 43.21C.060, 43.21C.075, and 43.21C.080. These regulations provide that:

- (a) Agencies may provide for an administrative appeal of determinations relating to SEPA in their agency SEPA procedures. If so, the procedures must comply with the following:
  - (i) The agency must specify by rule, ordinance, or resolution that the appeals procedure is available.
  - (ii) Appeal of the intermediate steps under SEPA (e.g., lead agency determination, scoping, draft EIS adequacy) shall not be allowed.
  - (iii) Appeals on SEPA procedures shall be limited to review of a final threshold determination and final EIS. These appeals may occur prior to an agency's final decision on a proposed action.

<sup>12</sup> MMC 20.02.200(2)

<sup>13</sup> WAC 197-11-350; *Anderson v. Pierce County*, 86 Wn. App. 290, 303, 936 P.2d 432 (1997)

<sup>14</sup> *Moss v. City of Bellingham*, 109 Wn. App. 6, 31 P.3d 703, *rev. denied*, 146 Wn.2d 1017 (2011).

<sup>15</sup> WAC 197-11-794(2).

<sup>16</sup> WAC 197-11-794(1)

public policy contained in the legislation authorizing the decision.”<sup>17</sup> The record and evidence must demonstrate that “environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA, “and that the decision to issue an MDNS was based on information sufficient to evaluate the proposal’s environmental impact.”<sup>18</sup> Use of the MDNS process as an alternative to requiring a full Environmental Impact Statement (EIS) is expressly encouraged by Washington State Law, the Washington State Supreme Court, and the Washington Department of Ecology.<sup>19</sup>

The City required the Applicant to prepare and submit several reports, including a Critical Areas Study<sup>20</sup>, a Geotechnical report, and a Transportation Impact Analysis, in addition to the required Environmental Checklist, for use in making the determination whether the Applicant’s proposal would have a probable significant adverse environment impact, and therefore require preparation of an EIS. These documents were revised in response to comments from Ms. Jordan and Mr. Gibbs, and the City received several other comments as well. Mr. Fielberg, the SEPA Responsible Official, considered this information in making the SEPA Mitigated Determination of Non-significance. This information included a description of the proposal with relevant and detailed information concerning impacts to the plants and wildlife, including migratory birds and waterfowl, at Lake Tye. The reports included detailed analysis of impacts to the community and transportation system, and a description of the current various uses of the Lake Tye Park. The Parametrix reports provide descriptions of impacts by power line and communication tower structures that, while not situated in the water like the proposed towers, cables, and guy lines, create analogous situations from which the impacts of the proposal can be inferred. Information concerning the potential impact of wave action from wakeboarders on the shoreline and on sediments was not available to Mr. Fielberg when he made the SEPA determination; however, the November 15, 2012 Earth Systems wave action report and analysis provides an effective rebuttal of the assertion that this information should have been considered and was unavailable to the decision-maker.

Appellant provided credible, substantial evidence in the form of testimony by Martha Jordan, Carolyn Vigas, and exhibits, argument, and her own testimony, that the proposed Cable Wakeboard Park will have an impact upon the Lake Tye Park environment. The argument and testimony concerning the increased potential for avian

---

<sup>17</sup> *Cougar Mountain Associates v. King County*, 111 Wn. 2d 742, 755 P.2d 264 (1988).

<sup>18</sup> *Anderson v. Pierce County*, 86 Wn. App. 290, 303, 936 P.2d 432 (1997)

<sup>19</sup> *Anderson v. Pierce County*, 86 Wn. App. 290, 303, 936 P.2d 432 (1997); *Moss v. City of Bellingham*, 109 Wn. App. 6, 31 P.3d 703, rev. denied, 146 Wn.2d 1017 (2011).

<sup>20</sup> MMC 20.05.060A. provides: When sufficient information to evaluate a proposal is not available, the director or his designee shall notify the applicant that a critical areas report is required. The city may hire an independent qualified professional to verify that a critical areas report is necessary and may be used to review the subsequent report. Critical areas reports shall be written by a qualified professional, as defined in the definitions section of this chapter. A critical areas report shall include a site analysis, a discussion of potential impacts, and specific mitigation measures designed to mitigate potential unavoidable impacts. A monitoring program may be required to evaluate the effectiveness of mitigating measures. These studies may be part of an expanded environmental checklist or included in an environmental impact statement.

collisions due to the location of Lake Tye in the migratory corridor is particularly persuasive. Appellant makes a compelling case that placing towers, cables, and guy support lines over the water will result in an increased likelihood of avian collisions. PSE has an avian protection program whereby avian diverters are installed in key areas where lines are in high-use areas, and data is kept concerning avian collisions. The reported PSE data supports an inference that the use of avian diverters in key areas will result in a decrease in avian collisions. The reported information also suggests that the 212 reported incidents involving swans between 2000 and 2008 do not actually have an impact on the swan population. This conclusion is corroborated by testimony from Mr. Hall and Ms. Jordan concerning the growth of the trumpeter swan population in the migratory corridor. Appellant did not provide substantial evidence concerning other impacts alleged in her appeal.

I find that the evidence provided by the Appellant supports a finding only that there will be “an impact” to wildlife such as migratory birds at Lake Tye, and to other uses of Lake Tye. The law does not require that all adverse impacts be eliminated; if it did, no change in land use would be possible.<sup>21</sup> I find that the evidence provided by the Appellant is insufficient to overcome the “substantial weight” accorded to the SEPA Responsible Official, that the proposed Cable Wakeboard Park will not result in a “significant impact.” I carefully considered the evidence and argument presented in this matter, and do not find the SEPA determination “clearly erroneous.”

## **B. Shoreline Substantial Development Permit**

A shoreline substantial development permit shall be granted only when the proposal is consistent with the Shoreline Management Act, the provisions of the Monroe Municipal Code, and the City’s approved Master Program. The City may attach conditions as to the approval of permits as necessary to assure consistency with these requirements. The State Shoreline Management Act provides that it is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. The Act provides that local government, in development master programs for shorelines of statewide significance, shall give preferences to uses which (in this order): recognize and protect the statewide interest over local interest; preserve the natural character of the shoreline; result in long term over short term benefit; protect the resources and ecology of the shoreline; increase public access to publicly owned areas of the shorelines; increase recreational opportunities for the public in the shoreline; and (provide for consideration of a number of various factors).<sup>22</sup> The City of Monroe Shoreline Master Program states: “The purpose of the “Tye Stormwater Facility” environment is to encourage and enhance recreational uses, public access, and appropriate development while accomplishing the water body’s primary function: storing and treating stormwater runoff from nearby lands.”<sup>23</sup>

---

<sup>21</sup> *Cougar Mountain Associates v. King County*, 111 Wn. 2d 742, 755 P.2d 264 (1988).

<sup>22</sup> RCW 90.58.020.

<sup>23</sup> SMP Chapter 2.B.7

The primary statewide interest in the Tye Stormwater Facility is the continued storage and treatment of stormwater runoff. This interest is unaffected by the proposal, and this long term benefit of the lake's use as a stormwater detention facility will remain. The City has also designated the purpose of Lake Tye as to encourage and enhance recreational uses, public access, and appropriate development. The proposal necessarily restricts some public access to areas of the lake and park, while enhancing other public access to these same areas and adding an additional recreational opportunity. This change does not compromise public access and public use of the lake, and therefore the proposal is consistent with the City's stated development goal for Lake Tye Park.

With respect to protection of the resources and ecology of the shoreline, Lake Tye never had a natural shoreline, and therefore does not have a natural character of shoreline to preserve. Any possible impacts to the shoreline by fallen wakeboarders climbing out of the lake are similar to those of swimmers, canoes, kayakers, and other existing activities at Lake Tye, similarly using the lake. It is suggested in the City staff review for the proposal that the wakeboard activity may provide for some aeration of the water, and promote a healthy aquatic environment. This seems speculative; however, the wave impact analysis provided by Earth Systems states that the impact of wave activity from wakeboarders to the shoreline should remain within the existing impacts of waves caused by wind and swimmers.

With respect to increasing recreational opportunities for the public in the shoreline, the proposed Cable Wakeboard Park adds an additional recreational opportunity that did not exist before. The proposal will restrict other recreational activities from the approximately 40% of the lake surface used by the Cable Wakeboard Park during the months of operation (April to November), but does allow for continuing existing recreational opportunities. The structures proposed for the Cable Wakeboard Park are less than 35 feet high and will not affect views by areas adjacent to this shoreline. The proposed project is determined, therefore, consistent with the policies and provisions of the Shoreline Management Act and the City's master program.

### **C. Conditional Use Permit**

Uses classified in the Shoreline Master Program as conditional uses may be authorized, provided the applicant can demonstrate all of the following: (a) That the proposed use will be consistent with the policies of the Shoreline Management Act and the policies of the Master Program; (b) That the proposed use will not interfere with the normal public use of public shorelines; (c) That the proposed use of this site and design of the project will be compatible with other permitted uses within the area; (d) That the proposed use will cause no unreasonably adverse effects to the shoreline environment designation in which it is to be located; (e) That the public interest suffers no substantial detrimental effect. Other uses which are not classified or set forth in the Master Program may be authorized as conditional uses; provided, that the applicant can demonstrate, in addition to the criteria set forth in subsection (A)(1) and (3) of this section, that extraordinary circumstances preclude reasonable use of the property in a manner consistent with the use regulations of the Shoreline Master Program. Subsection (3) provides: In the granting of all conditional use permits, consideration

shall be given to the cumulative impact of additional requests or like actions in the area.<sup>24</sup>

## **1. Shoreline Master Program Policies**

*Policy 1: In regulating uses in the “Tye Stormwater Facility” environment provide that first priority should be given to water-dependent uses, and second priority should be given to water-related and water-enjoyment uses. Non-water uses may also be allowed.*

The proposed Cable Wakeboard Park is a water-dependent recreational use, requiring an open body of water such as Lake Tye, and is an allowed use.

*Policy 2: Policies and regulations shall assure no net loss of shoreline ecological functions relevant to the facility’s primary purpose of holding and treating stormwater as a result of new development. Any loss of ecological functions as a result of maintaining the facility’s primary purpose, expanding and improving recreational and public access uses, or constructing new developments shall be mitigated.*

The proposed Cable Wakeboard Park will result in no loss of the facility’s primary purpose of holding and treating stormwater. By definition, the Lake Tye Stormwater facility has no wetlands and therefore is exempt from many regulations.<sup>25</sup> The proposed project will, however, include mitigation in an approved Wetland bank and therefore will meet or exceed the requirements of this policy.

*Policy 3: The City will encourage conservation and/or restoration projects, such as conserving and enhancing shoreline vegetation.*

The proposed Cable Wakeboard Park includes landscape enhancement with invasive species removal and replanting of native species, consistent with the requirements of this policy.

*Policy 4: The City will encourage water-oriented recreational activities, such as swimming, angling, strolling, and small, non-motorized and electric motor boating.*

The proposed Cable Wakeboard project provides water-dependent recreational activity for cable wakeboarding, an opportunity that would not otherwise exist. Existing water-oriented recreational activities, such as swimming, fishing, kayaking and canoeing, etc. will be affected by having approximately 40% of the lake surface used for the cable wakeboarding circuit during the operating season. However, the majority of

---

<sup>24</sup> MMC 19.01.120(A)(1).

<sup>25</sup> RCW 36.70A.030 provides: “Wetlands do not include those artificial wetlands intentionally created from nonwetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street, or highway. Wetlands may include those artificial wetlands intentionally created from nonwetland areas created to mitigate conversion of wetlands.”

the lake will remain available for all water-oriented recreational activities. The proposed use is therefore consistent with this policy.

*Policy 5. Where feasible, visual and/or physical public access should be required.*

The proposed Cable Wakeboard Park will include the addition of access points for wakeboarders to exit the water. These access points provide additional physical access to the lake, and areas where the public will have access to the lake.

## **2. Interference With Normal Public Use of Public Shorelines**

The proposed Cable Wakeboard Park will restrict public use of approximately 17 acres of the lake itself, but will provide improved access to the public shorelines of the Tye Stormwater Facility through the addition of access points, docks, and viewing area.

## **3. Compatibility With Other Permitted Uses**

Activities at Lake Tye Park include a range of outdoor activities such as running, walking, or jogging, tennis, basketball, skateboarding, and picnicking. Other permitted uses within the park include water-oriented and water-dependent activities such as swimming, fishing, canoeing, and kayaking. There are legitimate safety concerns with respect to the safety of mixing the cable wakeboard activity with these other uses of the lake. However, this is the case also with the existing activities: someone who is fishing or using a small boat must exercise caution when there is a nearby swimmer. There are concerns that the wakeboards are equivalent to motorized boats, exceeding the permitted power for the lake. This is not a persuasive argument, where the wakeboards will be separate and will essentially be towed by a cable on a circuit. There are also concerns with respect to the wakes generated by the cable wakeboard activity. The evidence presented indicates that these wakes will be similar to that of swimmers and divers. The proposed use here (cable wakeboarding on a circuit) provides for a 75-foot buffer between the wakeboarders and the western shoreline for other users of the lake to pass by the wakeboarding area. The Cable Wakeboard Park is compatible with other permitted uses of Lake Tye Park.

## **4. Unreasonable Adverse Effects to the Shoreline Environment**

The SEPA Responsible Official determined that the proposed Cable Wakeboard Park proposal, with conditions and mitigation requirements, has no probable significant adverse environment impacts for which an environmental impact statement (EIS) should be prepared. "Significant" as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality. Additional information provided by the Earth Systems wave impact study indicates no more impact to the shoreline by waves from wakeboarders than from waves generated by wind, swimmers, and divers. The proposal includes efforts to improve vegetation along the shoreline, and enhance access to the shoreline. There is no evidence to suggest the proposal will have any adverse effect to the shoreline environment.

\\  
\\

## **5. Substantial Detrimental Impact to the Public Interest**

Several individuals provided comment and testimony at the public hearing concerning opposition to the proposed Cable Wakeboard Park. Community displeasure is an insufficient ground for denying approval of a proposed development.<sup>26</sup> Concerns were voiced with respect to water-quality and safety, and the effect of wakeboard waves on the shorelines and sediments. These concerns are not supported by the actual wave impact analysis performed, or the studies of the shorelines and sediment compositions. The Cable Wakeboard Park proposal will not result in any substantial detrimental impact to the public interest that is not addressed in the conditions and mitigations required of this project.

## **6. Recommended Additional Condition**

As discussed in the findings of fact and in the SEPA appeal section, PSE has an avian protection program whereby avian diverters are installed in key locations where power lines are in high-use areas. The reported PSE data supports an inference that the use of avian diverters in key locations will result in a decrease in avian collisions. PSE also reports that the incidents of trumpeter swans and other birds involved in avian collisions do not have an impact on the swan or bird population. The conclusion that avian diverters will reduce the number of bird collisions with cable lines and guy wires such as are proposed for use with the Cable Wakeboard Park is consistent with the testimony and commentary of Ms. Jordan, Mr. Gibbs, Mr. Hall, and Mr. Sherrard, and the exhibits in this matter. The City is similarly situated: the location of the proposed Cable Wakeboard Park creates heightened concern with respect to avian collisions, yet the impact is not likely to have a significant impact on any avian population. Inclusion of avian diverters is likely to reduce the incident of avian collisions, but will change the aesthetics of the project by adding visible diverters to guy wires and cables on the project.

The Hearing Examiner recommends the following additional condition, taken from language suggested by Applicant in the event avian diverters were required:

“The Applicant shall install bird diverters, or other line visibility devices placed on or parallel to cables in the Cable Wakeboard Park, including guy wires. Such diverters shall meet the specifications for the specific species targeted as provided for in the current edition of the “Avian Protection Plan (APP) Guidelines” a joint document prepared by the U.S. Fish and Wildlife Service (USFWS) and the Edison Electric Institute’s Avian Power Line Interaction Committee (APLIC). The Applicant shall also incorporate a written contingency plan that lays out criteria for evaluating whether the facility with bird diverters leads to an unacceptable loss or injury to wintering waterfowl. This would include a discussion for possibly removing the cables in winter. City staff shall provide the Washington State Department of Wildlife an opportunity to review the proposed plans for diverters and the contingency plan criteria prior to approval. Said diverters shall be in place between November 1 and April 1 any year that towers or cables are present.”

---

<sup>26</sup> *Anderson v. Pierce County*, 86 Wn. App. 290, 303, 936 P.2d 432 (1997)

## **6. Cumulative Impact**

Lake Tye Park is essentially an urban park, and the policy of the City is to encourage additional recreational use of this public space. The Lake Tye Park open space is large enough to accommodate multiple uses, including the proposed Cable Wakeboard Park, without creating an unreasonably negative cumulative impact.

## **IV.DECISIONS and RECOMMENDATION**

1. The Appellant did not meet the standard of proof that the SEPA determination of MDNS is clearly erroneous. Therefore, the City's SEPA Determination of Nonsignificance with Mitigation is hereby affirmed.
2. The Hearing Examiner approves Applicant's Shoreline Substantial Development Permit SL2012-01 subject to the conditions noted below.
3. The Hearing Examiner recommends approval of the proposed Shoreline Conditional Use Permit SLCU2012-01 to the Department of Ecology subject to the conditions noted below.

### **Conditions:**

1. All development shall proceed in accordance with the mitigation conditions listed in the Mitigated Determination of Non-significance (SEPA2012-01) issued August 7, 2012.
2. All development is required to be in accordance with the approved site plans per Monroe Municipal Code 18.82.
3. Authorization to conduct construction activities is valid for five years. The hearing examiner may authorize one (1) twelve month extension.
4. The Applicant cannot commence construction until 21 days have elapsed from the date of transmittal of the Department of Ecology's final decision on Shoreline Conditional Use Permit SLCU2012-01.
5. The Applicant shall install bird diverters, or other line visibility devices placed on or parallel to cables in the Cable Wakeboard Park, including guy wires. Such diverters shall meet the specifications for the specific species targeted as provided for in the current edition of the "Avian Protection Plan (APP) Guidelines" a joint document prepared by the U.S. Fish and Wildlife Service (USFWS) and the Edison Electric Institute's Avian Power Line Interaction Committee (APLIC). The Applicant shall also incorporate a written contingency plan that lays out criteria for evaluating whether the facility with bird diverters leads to an unacceptable loss or injury to wintering waterfowl. This would include a discussion for possibly removing the cables in winter. City staff shall provide the Washington State Department of Wildlife an opportunity to review the proposed plans for diverters and the contingency plan

criteria prior to approval. Said diverters shall be in place between November 1 and April 1 any year that towers or cables are present.

6. The Applicant is required to comply with all applicable, local, State, and Federal laws, regulations, and rules.

Respectfully Submitted,

Dated: 12/11/2012



Carl D. Cox  
Hearing Officer  
PO Box 158  
Bellevue, WA 98009  
Tel: (425) 242-1504  
Fax: (425) 615-7202

## NOTICES

Appeal process for SEPA-related appeal issues: This decision of the Hearing Examiner is a final decision.

### **Judicial Appeals (MMC 21.60.030)**

Appeals from the final decision of the city council, planning commission, or hearing examiner, or other city board or body involving MMC Titles 15 through 20, and for which all other appeals specifically authorized have been timely exhausted, shall be made to Snohomish County superior court within twenty-one days of the date the decision or action became final, unless another time period is established by state law or local ordinance.

Notice of the appeal and any other pleadings to be filed with the court shall be served on the city as required by law.

The cost of transcribing and preparing all records ordered certified by the court or desired by the appellant for such appeal shall be borne by the appellant. The appellant shall post with the city clerk prior to the preparation of any records an advance fee deposit in the amount specified by the city clerk. Any overage will be promptly returned to the appellant.

### **Reconsiderations (MMC 21.50.080)**

MMC 21.50.080 allows a party of record to a public hearing or closed record appeal, to seek reconsideration of a recommendation or a decision by the Hearing Examiner or hearing body, by filing a written request for reconsideration with the Community Development Department within ten calendar days, following issuance of the written final decision.

All motions for reconsideration requests shall state the specific errors of law, fact, or procedure. Reconsideration will be granted only when an obvious legal error has occurred or a material factual issue has been overlooked that would change the previous decision. If a request for reconsideration is accepted, a decision or recommendation is not final until after a decision on the reconsideration request has been issued.

Appeals of shoreline permit decisions and decisions on shoreline permit revisions, letters of exemption and other approvals required by the Master Program shall be heard in accordance with Chapter 21.60 MMC and RCW 90.58.180.